Supreme Court, U.S.
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CLERK

No. 98-995

In The

# Supreme Court of the United States

October Term, 1998

HARRY ROBISHEAUX,

*Petitioner,*

v.

MEMORIAL CITY REGIONAL MALL,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court Of Texas**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

I. Does Petitioner's failure to properly present and preserve a federal question destroy the Supreme Court's Jurisdiction over this case?

## PARTIES TO THE PROCEEDINGS

**PETITIONER-PLAINTIFF**
Harry Robisheaux

**PETITIONER'S COUNSEL**
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**RESPONDENT-DEFENDANT**

METRO NATIONAL CORPORATION
There is no parent corporation or nonwholly-owned subsidiaries.

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE UNITED STATES

Respondent, Metro National Corporation, respectfully submits this Brief in Support of its request that this Court deny Petitioner's Petition for Writ of Certiorari.

## OPINIONS BELOW

The opinions of the Court of Appeals for the First District of Texas and the denial of Petitioner's Petition of Review by the Texas Supreme Court are reproduced as Appendix A and Appendix B to Petitioner's Petition for Writ of Certiorari.

## STATEMENT OF JURISDICTION

An Order of the Texas Supreme Court was entered on September 17, 1998. No petition for rehearing was submitted to the Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a); however, as discussed below, Petitioner failed to timely and specifically present a federal question to the Texas Courts and thus this Court does not have any jurisdiction over Petitioner's Petition; the decision over which Petitioner seeks review does not dispose of an issue of federal law.

## CONSTITUTIONAL AND STATUTORY AUTHORITIES

The statute relevant to this case is 28 U.S.C. §1257(a).

## STATEMENT OF THE CASE

Respondent respectfully disagrees with Petitioner's Statement of Facts. There is no basis for this Court to review Petitioner's factbound contentions, which have already been rejected by the trial Court and the Court of Appeals for the First District of Texas. Petitioner did not file his Original Petition against Respondent on July 26, 1996; he filed it on October 1, 1996, sixty (60) days after the running of the applicable statute of limitations. Petitioner's continual reliance on the allegation of obtaining improper or inaccurate information from the Texas Secretary of State was rejected by the Courts of the State of Texas, is inaccurate, based on inadmissible evidence, and does not raise a federal issue for this Court to address.

On April 24, 1997, the trial Court granted Respondent's Motion for Summary Judgment and entered a take-nothing judgment against all claims and causes of action of Petitioner against Respondent. On May 28, 1998, the Court of Appeals of the First District of Texas affirmed the Judgment. Petitioner filed his Petition for Review with the Supreme Court of Texas on July 9, 1998. On July 10, 1998, Petitioner filed his Supplemental Point of Error No. 4 to Petitioner's Petition for Review to the Supreme Court of Texas.

Petitioner failed to ever complain or present to the trial Court, Court of Appeals for the First District of Texas, or the Supreme Court of Texas, any timely request,

objection, or motion that any aspect of the trial Court's ruling or judgment raised a federal question or that it violated any specific constitutional right of Petitioner; equal protection, due process or otherwise. Although Petitioner's Supplemental Point of Error No. 4 makes a reference to his "equal protection and due process right", he fails to cite the federal or state constitution, or any specific amendments under the federal or state constitution on which he relies. See Appendix A. Petitioner's attempt to now assert a federal question involving violations of specific provisions of the United States Constitution is untimely, and these arguments have not been properly presented or preserved. As a result, this Court lacks jurisdiction in this case.

## REASONS TO DENY PETITIONER'S WRIT

### I. Petitioner failed to present or preserve a federal question to the Supreme Court of Texas and this Court does not have jurisdiction over this matter.

This Court has long adhered to the rule in reviewing state court judgments under 28 U.S.C. §1257 that it will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision that the Supreme Court has been asked to review. *Adams v. Robertson*, 117 S.Ct. 1028, 1029 (1997). Petitioner must establish that a federal question was properly and timely presented to the highest state court and that that court had a fair opportunity to address the federal question on which Petitioner bases its Petition for Writ of Certiorari. *Id.; Webb v. Webb*, 101 S.Ct. 1889, 1894. (1981). Additionally, this Court's Rule

14.1(g)(i) requires Petitioners provide this Court with specific references to the places in the record where the matter appears so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a Writ of Certiorari. A Petitioner's failure to satisfy these minimal requirements destroys this Court's jurisdiction to grant a Writ of Certiorari. *Adams,* 117 S.Ct. at 1031; *Webb,* 101 S.Ct. at 1891-1892.

The basic concept of error preservation under Texas law is that claims not made at the trial court cannot be made for the first time in the appellate courts. *Branden v. Downey,* 811 S.W.2d 922, 929 (Tex. 1991); *Susman Godfrey, L.L.P. v. Marshall, Inc.,* 23 SW2d 105, 109 (Tex. App. – Dallas 1992 org. proceeding). Texas Rule of Appellate Procedure 33.1(a) provides that as a prerequisite to presenting a complaint on appellate review, the record must show (1) that the complaint was made to the trial court by timely request, objection or motion that stated the grounds for a ruling that the complaining party; and (2) that the trial court ruled on the request, objection or motion or refused to rule on the request. Tex. R. App. P. – 33.1(a) (Vernon 1997). Failure to satisfy these requirements results in waiver of any error from a Texas trial court.

Petitioner has not demonstrated that he complied with Texas' rules for raising and preserving a federal question before the Texas Supreme Court, the Texas Court of Appeals for the First District of Texas, or the Texas District Court. Petitioner failed to present any claim to the Texas Courts by timely request, objection or motion that any aspect of the District Court's ruling or judgment raised a federal question or violated any of Petitioner's specific federal or state constitutional rights. The Texas

Supreme Court was unable to rule and did not rule on any federal issue because none were presented to the Texas Supreme Court. Petitioner has failed to comply with this Court's and the Texas court's requirements for federal error presentation and preservation. Petitioner cannot make specific references to the federal question raised below, in compliance with this Court's Rule 14.1(g)(i), because no federal question was presented to the Texas Supreme Court. This Court lacks the jurisdiction necessary to grant Petitioner's Petition for Writ of Certiorari and the Writ should be denied.

## CONCLUSION

Because Petitioner failed to present or preserve a federal question to the Texas Supreme Court, and because Petitioner has failed to comply with the Supreme Court's Rules concerning preservation and presentation of a federal question, this Court lacks jurisdiction to grant Petitioner's Petition for Writ of Certiorari, and the Writ should be denied.

Respectfully submitted,

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# APPENDIX A

App. 1

No. _____

IN THE

**SUPREME COURT**

OF TEXAS

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**HARRY ROBISHEAUX**

Petitioner,

v.

**MEMORIAL CITY REGIONAL MALL**

Respondent

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Appealed from the First Court of Appeals
at Houston, Texas
No. 01-97-00889-CV

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**SUPPLEMENTAL POINT OF ERROR NUMBER FOUR TO PETITION FOR REVIEW**

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## POINT OF ERROR NUMBER FOUR IT IS ERROR TO DENY PETITIONER HIS EQUAL PROTECTION AND DUE PROCESS RIGHT OF ACCESS TO COURT, BASED ON THE STATUTE OF LIMITATIONS, WHEN PETITIONER'S ERROR WAS CAUSED BY THE MISTAKE OF AN OFFICIAL FUNCTIONARY OF THE STATE OF TEXAS

When there is reliance on erroneous official information given by an official functionary preventing a proper filing, this Court has allowed the litigant relief. *Baker v. Goldsmith,* 582 S.W.2d 404 (Tex. 1979); *Gracey v. West,* 422 S.W.2d 913 (Tex. 1968); *Hanks v. Rosser,* 378 S.W.2d 31 (Tex. 1964). That relief has not been extended when a mistake is made by an official functionary of the Secretary of State which causes a litigant to be deprived of his due process right of access to the courts. *Matthew's Trucking v. Smith,* 682 S.W.2d 237 (Tex. 1984).

The reasoning which forms the basis for relief in the first instance is that it is the official duty of the functionary to know what his office records show, and when he gives an inquiring litigant the wrong information within that field the litigant is not at fault. *Alexander v. Hagedorn,* 378 S.W.2d 31. That same reasoning should form the basis of relief for Petitioner in the instant case as it is the mistake of a state official which serves to deny Petitioner his right to bring his case before the court. This is particularly true in this case, given the fact that the Secretary of State's office is established by the state of Texas to be the primary source from which litigant's attorneys determine the agent for service.

As recited earlier in this brief, the information obtained by Petitioner's counsel's legal assistant, from

the Secretary of State, was that Respondent's correct name was Kirkland's of Memorial City Mall, and that it could be served through its registered agent, CT Corporation. (See Exhibit 3 of Plaintiff's Summary Judgment Response.) It is this action by a state of Texas official functionary that caused Petitioner's counsel to misidentify the defendant, and to lose his right to seek damages in court.

Petitioner has established that an official functionary of the state of Texas caused the mistake by which he is now denied his equal protection and due process right to redress through the court system. Based on the fact that a mistake made by an official of the agency of the state of Texas which is directed to provide information regarding agents for service, Petitioner should be granted relief from the rules of the statute of limitations, and allowed to exercise his equal protection and due process right of access to the courts.

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